No. 99-1277

Supreme Court, U.S.
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In the Supreme Court of the United States

PHILIP MORRIS INCORPORATED, ET AL.,
PETITIONERS

v.

HOWARD A. ENGLE, M.D., ET AL.,
RESPONDENTS[1]

On Petition for a Writ of Certiorari to the Florida District Court of Appeal for the Third District

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REPLY BRIEF FOR PETITIONERS

It is difficult to imagine a more clear-cut violation of the Due Process Clause than a trial presided over by a judge with a significant interest in the outcome. Yet respondents do not dispute that Judge Kaye, a resident of Florida, is a former smoker who suffers from heart disease; thus, under their own definition, he is a member of the certified plaintiff class. Respondents also do not deny that allowing a member of the plaintiff class to preside over a class action is a grievous violation of due process. Instead, respondents conjure up a variety of procedural objections to the petition. They contend that there is no final judgment for this Court to review; that the decision below rests on adequate state grounds; and that, because of a "Catch-22" inherent in Florida law, the trial judge was disabled from responding to the allegations of interest. Each of these contentions is frivolous.

1. *Final Judgment from the Highest State Court in Which Review Could Be Had.* Respondents assert (Br. in Opp. 23-24) that the judgment below is not final under 28 U.S.C. § 1257, because review can be sought at the end of the state court litigation. Respondents are incorrect.

Petitioners have no right under Florida law to litigate the federal issue presented here in any subsequent appeal. Under Florida law, the denial of a petition for prohibition is a ruling on the merits that precludes the appellate court from reconsidering the same claim on appeal. See *Nordqvist* v. *Nordqvist*, 586 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 1991). Accordingly, this is a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

In any event, review is proper under the alternative jurisdictional ground presented in the petition (at 1-2) — which respondents fail to address. A petition for prohibition is an original action under Florida law. See FLA. CONST. art. V, § 4(b)(3); FLA. R. APP. P. 9.030(b)(3), 9.100. It has long been

settled that "[p]rohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of the Judicial Code * * *." *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 31 (1916); see also *Missouri ex rel. St. Louis, B. & M. Ry.* v. *Taylor*, 266 U.S. 200, 206 (1924) ("The application for a writ of prohibition is an independent adversary suit which was finally determined by the judgment under review."); *Michigan Central R.R.* v. *Mix*, 278 U.S. 492, 494 (1929) (state supreme court's unexplained denial of defendant's application for a writ of prohibition "is final within the meaning of § 237a of the Judicial Code"); *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit and the judgment finally disposing of it is a final judgment within the meaning of § 237(a) of the Judicial Code."); *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257 * * *."); *Fisher* v. *District Court,* 424 U.S. 382, 385 n.7 (1976) ("A judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court," is a final judgment within the meaning of 28 U.S.C. § 1257); *Board of Educ.* v. *Superior Court,* 448 U.S. 1343, 1345-1346 (1980) (Rehnquist, J., in chambers) (same); R. STERN ET AL., SUPREME COURT PRACTICE 108 (7th ed. 1993).

Respondents also contend that the District Court of Appeal's decision does not constitute action by the highest court from which review could be had. Respondents again are mistaken. As noted in the petition (at 1), the Florida Supreme Court had no jurisdiction to review the denial of the application for a writ of prohibition, because the District Court of Appeal denied the petition without opinion and did not certify a question to the higher court. See FLA. CONST. art. V, § 3; *Jenkins* v. *Florida*, 385 So. 2d 1356, 1359 (Fla. 1980). This

Court has recognized that under such circumstances the District Court of Appeal is the highest court of Florida in which a decision could be had. See, *e.g.*, *Palmore* v. *Sidoti*, 466 U.S. 429, 430 (1984); *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967).

2. *"Adequate and Independent State Grounds."* Respondents insist that this Court lacks jurisdiction because the decision below rests on two state-law grounds: (a) petitioners' supposed reliance on "rumor and gossip from unidentified people, at unidentified times, and under unidentified circumstances," and (b) the alleged untimeliness of the motion to disqualify the trial judge. Br. in Opp. 12, 14-21. There is no basis for concluding that the decision below was based on either rationale.

To begin with, this Court has held that "'ambiguous or obscure adjudications by state courts do not stand as barriers'" to the Court's review of federal constitutional questions. *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983) (quoting *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940)); accord *Arizona* v. *Evans*, 514 U.S. 1, 9 (1995). Accordingly, where "a state court decision fairly appears to rest primarily on federal law * * * [and] the adequacy and independence of any possible state law ground is not clear from the face of the opinion," this Court assumes that it is based on *federal* law. *Long*, 463 U.S. at 1040-1041; see also, *e.g.*, *Harris* v. *Reed*, 489 U.S. 255, 260-263 (1989); *New York* v. *Class*, 475 U.S. 106, 109-110 (1986).[1]

Here, there is not even any ambiguity: the record shows

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[1] Respondents assert, in reliance on a handful of old cases, that this Court lacks jurisdiction whenever the judgment *might* have rested on a nonfederal ground. See Br. in Opp. 15. The holdings of those cases were overruled by *Michigan* v. *Long*. See 463 U.S. at 1038, 1042; see also *id.* at 1066-1067 (Stevens, J., dissenting).

that the decision below rests on federal law.

First, in moving to disqualify Judge Kaye, petitioners relied unambiguously on the Due Process Clause of the United States Constitution. Motion to Disqualify at 8, *Engle* v. *R.J. Reynolds Tobacco Co.* (Fla. Circ. Ct. filed Aug. 2, 1999) (No. 94-08273 CA 22). Petitioners renewed this argument in their Petition for Writ of Prohibition to the Third District Court of Appeal, asserting that "[t]he United States Supreme Court has held unequivocally that the Constitutional guarantee of due process of law demands that a judge not sit in a case in which he has a financial interest." Petition for Writ of Prohibition at 18, *Philip Morris Inc.* v. *Engle* (Fla. Dist. Ct. App. filed Aug. 12, 1999) (No. 99-02080); see also *id.* at 18-20, 24-28 (discussing federal and state precedent).

Second, respondents did not contend below that state law barred the relief that petitioners sought. Indeed, respondents did not respond to petitioners' motion or petition on the merits at all, much less put forth state grounds for denial.[2]

Third, the summary denials of petitioners' motion and petition contain no rationale, much less a plain statement that the decisions were based on state law. The trial court ordered that petitioners' motion to disqualify was "DENIED as being legally insufficient," Pet. App. 2a, while the appellate court's order stated in its entirety that "[f]ollowing review of this petition for writ of prohibition, it is ordered that said petition is hereby denied." *Id.* at 1a. Under these circumstances, the only proper inference is that the decision below was a rejection of petitioners' federal due process claim, not a finding of some procedural obstacle never even mentioned by the parties or the

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[2] Respondents' only response to petitioners' filings expressly declined to address the propriety of disqualification. Engle Florida Class Response and Opposition to Petitioners' Second Motion to Supplement Record at 5, *Philip Morris, Inc.* v. *Engle* (Fla. Dist. Ct. App. filed Nov. 4, 1999) (No. 99-0280).

courts. See *Harris*, 489 U.S. at 266; see also *Evans*, 514 U.S. at 9-10; *Long*, 463 U.S. at 1043-1044. Cf. *Ylst* v. *Nunnemaker*, 501 U.S. 797, 805-806 (1991); *Coleman* v. *Thompson*, 501 U.S. 722, 740 (1991).

Even if the court below had been aware of the state law grounds now asserted for the first time by respondents, it could not have premised its decision on those grounds, because they are plainly inapplicable to this situation.

a. *"Rumor and Gossip."* Relying on *Barwick* v. *State*, 660 So. 2d 685 (Fla. 1995), respondents contend that the recusal motion was properly denied as based on "rumor and gossip." See Br. in Opp. 12, 13, 18, 21, 24. But *Barwick* (a case never cited below) dealt with disqualification for *fear of bias*, under Fla. Stat. § 38.10. Petitioners' due process claim, on the other hand, is based on the denial of their motion for disqualification for *conflict of interest* under Fla. Stat. § 38.02.

The distinction between the two statutes is critical: § 38.10, by its terms, looks only to whether the facts alleged by the movant would cause a reasonable person to fear that the judge is biased against him. If so, under Florida law, the judge must recuse himself, without addressing the truth or falsity of the movant's allegations. See *Suarez* v. *Dugger*, 527 So. 2d 190, 191 (Fla. 1988) ("It is not a question of how the judge feels; it is a question of what feeling resides in the [movant]'s mind and the basis for such feeling.") (internal quotation marks omitted) (*per curiam*). *Barwick* held only that the "rumor and gossip" at issue in that case were insufficient as a matter of law to cause a reasonable person to fear bias under § 38.10. By contrast, where a disqualifying *conflict of interest* under § 38.02 is alleged, the truth or falsity of the allegations *must* be explored, and a judge cannot prevent a litigant (or reviewing court) from assessing the claim simply by remaining silent based on an unexpressed belief that the source of the allegation of interest is insufficiently credible. See *In re Frank*, 2000 WL 183512, at

*4-*5 (Fla. Feb. 17, 2000). Respondents are unable to cite any case in which a claim of interest under § 38.02 was rejected because the allegation of interest was based on "rumor" or "gossip."

In any event, even if the *Barwick* standard were applicable here, petitioners' allegations plainly satisfied it. Petitioners' contention that Judge Kaye is a member of the plaintiff class was based not on rumor and gossip from unidentified sources but on statements (which respondents *do not dispute*) of the judge himself and the judge's own clerk, as well as numerous newspaper articles. See Pet. 6. It is hard to imagine what more a litigant in this situation could be expected to produce, at least to be entitled to a hearing on the merits. See *Barnett* v. *Barnett*, 727 So. 2d 311, 312 n.2 (Fla. Dist. Ct. App. 1999) ("There is no requirement that the party have personal knowledge of the facts alleged [in a disqualification motion] nor that the motion be accompanied by sworn affidavits of persons with such knowledge."); *Robbins* v. *Robbins*, 742 So. 2d 395, 397 (Fla. Dist. Ct. App. 1999) (hearsay allegation is cognizable in disqualification motion and may itself constitute legally sufficient grounds for recusal); see also *Suarez*, 527 So. 2d at 191 (allegations based on statements attributed to judge in newspaper article warranted recusal). In these circumstances, it is absurd to suppose that an inapposite rule from the uncited *Barwick* case was the basis of the unexplained decision below.

b. *Timeliness*. Respondents contend (Br. in Opp. 18-19) that the motion to disqualify was untimely because it was based, in part, on articles published several months or years before the motion was filed. But the time period for filing a motion to disqualify runs from actual, not constructive, notice of the relevant facts. See FLA. R. JUD. ADMIN. 2.160 (motion to disqualify must be made within "10 days after discovery of the facts constituting the grounds for the motion"); *Brake* v. *Murphy*, 693 So. 2d 663, 665 (Fla. Dist. Ct. App. 1997) (interpreting rule to

require *actual knowledge*).[3]

In support of their motion to disqualify and their petition for a writ of prohibition, petitioners submitted the sworn affidavits of nine attorneys for petitioners, who stated under oath that they and their clients were unaware that Judge Kaye was a former smoker with heart disease prior to July 22, 1999. Neither respondents nor the courts below disputed the veracity of this sworn testimony.[4] That evidence conclusively establishes the timeliness of petitioners' motion for disqualification. See *Robbins* v. *Robbins*, *supra*.[5]

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[3] Respondents' reliance on *Rivera* v. *State*, 717 So. 2d 477 (Fla. 1998), and *Steinhorst* v. *State*, 636 So. 2d 498 (Fla. 1994), is misplaced. *Steinhorst* involved a motion to vacate a criminal conviction under Florida Rule of Criminal Procedure 3.850, which requires the motion to be filed within two years of final judgment unless "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." This case, in contrast, involved a disqualification request under Rule 2.160, which does not impose a constructive notice rule. *Rivera* does not address the question whether constructive notice is sufficient to start the time period for a motion to disqualify, because the defendant apparently did not allege that he was unaware of the newspaper interview underlying his motion at the time it was published.

[4] Respondents speculate that petitioners must have had prior notice of newspaper articles reporting that Judge Kaye is a "possible former smoker" because they "follow the news carefully." Br. in Opp. 19 n.6. The claim is legally irrelevant: *Brake* v. *Murphy*, *supra*, holds that receipt of documents showing a disqualifying conflict does not trigger the filing deadline if the party is unaware of the legal significance of the documents.

[5] Even if petitioners' motion were not timely, their failure to comply with the time deadline would not bar this Court's review. A state procedural rule is not an "adequate" state ground "unless the procedural rule is 'strictly * * * followed.'" *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) (quoting *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964)). As the Florida courts themselves have acknowledged, failure to comply with the time limit for a disqualification motion will be disregarded if the case involves "patent

In sum, there is no basis to assume that the denial of the recusal motion as "legally insufficient" (Pet. App. 2a) was anything other than what it purported to be — a ruling on the merits of petitioners' federal due process claim. Respondents' belated effort to introduce state law procedural obstacles without support in the record or in Florida law is a pure invention designed to avoid this Court's review.

3. *There Is No "Catch-22."* Respondents' final argument (Br. in Opp. 25-29) that, because of petitioners' § 38.10 motion for recusal based on *fear of bias*, Judge Kaye was disabled by state law from responding to the allegations in the § 38.02 motion for recusal based on *actual interest*, is complete nonsense. Under Florida law, if a trial judge is alleged to have a disqualifying interest under § 38.02, he *must* address the factual allegations on the merits. If the judge does not expressly state that the allegations are false, they are taken as true, and the only issue is whether the facts constitute a disqualifying interest as a matter of law. See *Hooks* v. *State*, 207 So. 2d 459, 464 (Fla. Dist. Ct. App. 1968).[6]

None of the statutes, rules or cases cited by respondents supports the argument that Judge Kaye was legally precluded from confirming or denying that he is a former smoker with heart disease. None of the authorities cited by respondents even

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prejudice." *Pistorino* v. *Ferguson*, 386 So. 2d 65, 66 (Fla. Dist. Ct. App. 1980) (collecting cases); see also, *e.g.*, *Klapper-Barrett* v. *Nurell*, 742 So. 2d 851, 852 (Fla. Dist. Ct. App. 1999). It is difficult to imagine more patent prejudice than the trial judge's own substantial interest, as a class member, in the outcome of the case.

[6] Contrary to respondents' assertion (Br. in Opp. 28-29), the Florida Supreme Court's invalidation of the sworn-statement requirement of Section 38.04, *In re Amendments*, 458 So. 2d 245 (Fla. 1984), does not prevent a trial judge from addressing allegations that he has a disqualifying interest. It simply means that the judge is not required to submit a sworn affidavit in doing so.

relates to disqualification for *actual interest* (§ 38.02); instead, each relates to disqualification based on *fear of bias* (§ 38.10). For example, Rule 2.160(f), which provides that the judge should rule only on legal sufficiency and not address the underlying factual allegations, applies by its terms *only* to disqualification based on fear of bias. Similarly, the cases on which respondents rely — *Barwick* v. *State*, *supra*; *Rogers* v. *State*, 630 So. 2d 513 (Fla. 1993); *Fischer* v. *Knuck*, 497 So. 2d 240 (Fla. 1986); and *Dragovich* v. *State*, 492 So. 2d 350 (Fla. 1986) — involve only disqualification for fear of bias.

Not surprisingly, the sole case to address the situation confronting a judge faced with pending motions for disqualification based on both actual interest and fear of bias, *Douglass* v. *Douglas*, 633 So. 2d 1166, 1167 (Fla. Dist. Ct. App. 1994), unequivocally provides that it is proper for the judge to address the factual allegations underlying the claim of interest.[7]

Finally, a moment's reflection shows that respondents' position could not possibly be the law of Florida or any other state. On respondents' theory, any trial judge who has a financial interest in a case can avoid disqualification, and thereby deprive a litigant of due process, simply by refusing to address the factual allegations in the recusal motion. (And, on respondents' theory, an appellate court would have to assume that the allegations are false.) As noted above, Florida law avoids that nonsensical result. See *Hooks*, 207 So.2d at 464.[8]

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[7] For other cases noting or discussing the differences between § 38.02 and § 38.10, see, *e.g.*, *St. George Island, Ltd.* v. *Rudd*, 547 So. 2d 961, 962 (Fla. Dist. Ct. App. 1989); *State ex rel. Cannon* v. *Churchwell*, 195 So. 2d 599 (Fla. Dist. Ct. App. 1967).

[8] Contrary to respondents' suggestions (Br. in Opp. 25-26), *Hooks* has not been overruled, disapproved, or limited, remains the law of Florida, and was binding on Judge Kaye. See *Pardo* v. *State*, 596 So. 2d 665, 666 (Fla. 1992). As noted above, Rule 2.160(f) does not apply to accusations of interest. By the same token, Rule 9.100(e)(3) relates entirely to whether a trial judge

Respondents' "Catch-22" argument should thus be dismissed as a complete contrivance. There is no serious argument that Judge Kaye was legally prohibited from refuting the allegations about his smoking and medical history — if, in fact, they were false.[9]

4. What is left, then, is a straightforward and disturbing scenario. A case in which hundreds of billions of dollars are on the line is being adjudicated by a trial judge who is a member of the plaintiff class. The highest Florida court in which review can be sought has approved a determination that petitioners' due process objection to this state of affairs is "legally insufficient." And respondents do not even deign to dispute the due process issue on the merits. The constitutional violation and the importance of the issue are plain. Only this Court can provide relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the decision below summarily reversed.

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must file a *formal written response to a petition for a writ of prohibition*, not to whether he should address factual allegations when he disposes of a motion to disqualify himself based on his interest in the case.

[9] Respondents' argument is particularly unwarranted given that, as the Florida Supreme Court has recently reaffirmed, Judge Kaye had an obligation to disclose any potential conflicts of interest in the case *sua sponte* even if they were not legally sufficient grounds for disqualification. See *In re Frank*, 2000 WL 183512, at *10 (Fla. Feb. 17, 2000). Obviously, Judge Kaye was aware of his disqualifying interest at all times, yet he failed to make the necessary disclosures.

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